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Supreme Court of the United States

OCTOBER TERM, 1938.

No. 182

FORD MOTOR COMPANY,

Petitioner,

against

NATIONAL LABOR RELATIONS BOARD.

No. 183

FORD MOTOR COMPANY,

Petitioner,

against

NATIONAL LABOR RELATIONS BOARD

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

FREDERICK H. WOOD,
LOUIS J. COLOMBO,
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Attorneys for Petitioner.

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PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, FORD MOTOR COMPANY, respectfully prays:

(1) For a writ of certiorari in No. 182 to the United States Circuit Court of Appeals for the Sixth Circuit to review [redacted] an order of that Court

entered May 5, 1938 (R. 51), granting to the National Labor Relations Board (hereinafter sometimes called "the Board") leave to withdraw, without prejudice, a petition (R. 1) of the Board for the enforcement of an order of the Board against petitioner; and

(2) For a writ of certiorari to review an order of said Court (R. 108) in No. 183 entered on June 10, 1938, remanding to the Board a cause instituted in said Court by petitioner to review and set aside the said order of the Board (R. 62).

Review of the orders of the Court below is thus sought in two cases: (1) a case brought by the Board to enforce its order (hereinafter sometimes called "the Board's case"), and (2) a case brought by petitioner to set aside the Board's order (hereinafter sometimes called "the petitioner's case").

The subject-matter of the two cases is the same, to wit, the Board's order, and the records in both have been printed together by the Clerk of this Court. The cases are so closely related that for a full understanding of either reference to the record in the other is necessary, and it seems probable, if not certain, that in considering each the Court below took judicial notice of the record in the other. For these reasons and because the two cases present similar and closely related, if not substantially the same, questions, the prayer for a writ in each case is made by a single petition.

SHORT AND SUMMARY STATEMENT OF THE MATTER INVOLVED AND OF THE QUESTIONS PRESENTED

The questions presented involve an interpretation of paragraphs (d), (e) and (f) of Section 10 of the National Labor Relations Act (49 Stat. 449; 29 U. S. C. §§ 151-166). Said paragraphs are set forth as an appendix to this petition. (See pp. 28-30, post)

1. The Board filed with the Court below its petition (R. 1) to enforce an order made against the petitioner and a certified transcript of record of the proceedings before the Board (R. 6). The jurisdiction of the Court was thus complete. *National Labor Relations Act*, Sec. 10(e); *In re Petition of National Labor Relations Board*, decided by this Court, May 31, 1938. The petitioner, although not required so to do by the Act, filed an answer (R. 9) alleging that the Board's order and each and every part thereof was invalid upon the grounds set forth in the answer and praying that the Board's order be "set aside" (R. 21). Thereafter on motion by the Board (R. 36) the Court below made an order granting leave to the Board to withdraw its petition (R. 51),[1] thus in effect granting leave to the Board voluntarily to discontinue its suit.

Section 10(e) of the National Labor Relations Act provides that upon the filing of a petition by the Board to enforce an order made by it and of a transcript of the record in the proceedings before the Board

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[1]So much of said order, made on May 5, 1938, as gave the Board leave to withdraw the transcript of record as well as its petition was vacated by the Court on May 9, 1938 (R. 54). The Board did not actually purport to avail itself of the leave thus granted until June 2, 1938, when it filed its "withdrawal of petition" (R. 55).

> "the court * * * shall have jurisdiction of the proceeding and of the question determined therein * * * and shall have power * * * to make and enter upon the pleadings, testimony and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board."

No answer is required to be filed. The Act thus provides that if, in a suit brought by the Board to enforce its order, the Court shall be of the opinion that the order is invalid, the Court shall enter a decree setting it aside, without answer or cross-bill by the respondent employer.

Conversely, Section 10(f) provides that if, in a suit by "any person aggrieved" by an order of the Board to modify or "set aside" the order, the court shall be of the opinion that the order is valid, it shall enter a decree "enforcing the order", without answer or cross-bill by the Board.

The Act thus expressly provides for affirmative relief to the respondent in proceedings had to review an order of the Board, if such respondent prevails, whether the suit be one by the Board to enforce or by the "aggrieved party" to set aside. If the Board sues to enforce its order, the employer is entitled to a decree setting the order aside, if found by the Court to be invalid, and not merely to a dismissal of the Board's petition to enforce. Conversely, if the "aggrieved party" sues to set the order aside, the Board is entitled to affirmative relief in the form of a decree of enforcement, if the order is held to be valid, and not merely to a dismissal of the suit to set aside.

The following question is thus presented:

Under the National Labor Relations Act, which provides for an affirmative decree in behalf of a successful

respondent in a suit to review an order of the Board, whether prayed for by the respondent or not, and whether the suit be begun by petition of the Board to enforce or by petition of the "aggrieved party" to set aside, may the court permit the petitioner in such suit to withdraw or voluntarily discontinue the same, without prejudice, and without the consent and over the opposition of the respondent?[2]

2. While the Board's case was pending in the Court below, the petitioner filed its petition to review and set aside the order of the Board (R. 62). The transcript of the proceedings before the Board was filed by order of the Court in the petitioner's case (R. 80). The jurisdiction of the Court was thus complete and exclusive (Section 10(e) and (f)). *In re Petition of National Labor Relations Board*, decided by this Court, May 31, 1938. Thereafter, on motion of the Board (R. 103), the Court entered an order (R. 108) remanding the case to the Board for further proceedings before it.[3] This was done without any determination that the order of the Board was invalid, without any determination as to the necessity or propriety of further action by the Board, and without setting aside the order of the Board.

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[2]The precise question presented in this case is whether the Court had power to grant the Board's motion for leave to withdraw or discontinue its suit, without prejudice. It seems clear, however, that if the Board is entitled to withdraw or discontinue without prejudice a suit instituted by it to enforce its order, the party against whom the order is made would have the right to withdraw or discontinue, without the consent and over the opposition of the Board, a suit brought by such party to set the order aside. This is so because, in either case, if the respondent in the suit prevails, it is entitled to an affirmative decree.

[3]The Board neither answered nor moved to dismiss either for lack of jurisdiction in the court or because the petition failed to state a cause of action or for any other reason.

The Act provides that the "jurisdiction of the court shall be exclusive". Section 10(e) and (f). It contains no provision whereby, after the jurisdiction of the court has attached, it may divest itself of jurisdiction by remanding the case to the Board upon the motion of either party. The only provision which the Act contains for further proceedings before the Board is that which empowers the court to enter an order directing that additional evidence be taken before the Board at the instance of either party upon a showing satisfactory to the court. Section 10(e). In such event, the case is not "remanded" to the Board, and the Board is not empowered to set aside or modify its order, but only to "file its recommendations, if any, for the modification or setting aside of its original order" by reason of the new evidence so taken. Section 10(e).

Upon the facts stated, the following question of law is thus presented:

Under the National Labor Relations Act, which contains no provision whereby after the jurisdiction of the court has attached the court may divest itself thereof, may the court, upon motion either of the Board or of the party aggrieved by its order, divest itself of jurisdiction by remanding the case to the Board for further proceedings?

3. The avowed purpose of the Board's motion to remand (R. 103) was to permit the Board to set aside the order which was the subject-matter of the petitioner's suit, and after further proceedings, to enter a new one. The necessary and intended effect of the Board's motion and of the Court's order thereon was to put an end to the subject-matter of the petitioner's suit and hence was equiva-

lent to an order of dismissal at the instance of the respondent, which had not moved to dismiss either for lack of jurisdiction or for failure to state a cause of action.

Upon the facts stated, the following question of law is presented:

Under the National Labor Relations Act, may the Court, after its jurisdiction has attached in a proceeding to set aside an order of the Board, enter an order upon motion of the Board, over petitioner's opposition, the effect of which is to order that the petitioner's case be dismissed, otherwise than in response to a motion to dismiss either for lack of jurisdiction or failure to state a cause of action?

4. Petitioner's answer in the Board's case alleged that the order was void, *inter alia,* for failure to accord to the petitioner that "full, fair and open" hearing required both by the Act and by the due process clause (R. 11-17). Its petition to set aside the Board's order in the suit instituted by petitioner contained similar allegations (R. 66-72). It affirmatively appears both from the Board's motion to withdraw its own case (R. 37) and its motion to remand the petitioner's case (R. 104) that both were made for the purpose of enabling the Board to conform its procedure (we believe only superficially) to the requirements of the recent decision of this Court in *Morgan* v. *United States,* No. 581, decided April 25, 1938, rehearing denied May 31, 1938. In neither motion did the Board confess that its procedure was in conflict with the principles of law laid down in that case. It asserted in both, however, that it desired to obviate questions and issues raised by that deci-

sion.[4] The purpose of the Board in each motion, therefore, was to become revested with jurisdiction for the purpose of taking further proceedings to correct, or pretend to correct, actual or possible errors by reason of which its outstanding order might be held to be invalid.

The following question, therefore, common to both cases, is presented:

Under the National Labor Relations Act, under which the jurisdiction of the Court is exclusive, and under which, after the jurisdiction of the Court has attached, it is required to proceed to a decree either enforcing or setting aside the order, may the Court, in the absence of any provision permitting it so to do, divest itself of jurisdiction and surrender the same to the Board for the purpose of giving to the Board the opportunity to correct actual or possible errors committed by it, either of law or of fact?

5. The following question would also seem to be common to both cases:

In a proceeding in a Circuit Court of Appeals brought under the National Labor Relations Act, may the Court, after its jurisdiction has once attached, divest itself of such

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[4] In the motion to remand petitioner's case, it was stated that the granting of the motion "would result in obviating upon the record certain questions" arising under the *Morgan* case (R. 103-104). In the Board's motion to withdraw its own case, it said (R. 37-38):

> "The Board makes the motion herein without conceding in any respect that the supervening decision of the Supreme Court in the *Morgan* case would apply to the Board's procedure in the case herein under the Act and the Rules and Regulations of the Board, or that any such question is properly presented for consideration by the Court. The purpose of this motion is to eliminate certain issues as to the validity of the Board's procedure in this case. * * * In this manner questions concerning the validity of the Board's procedure will be obviated on the transcript of record, if one is later certified to the Court."

jurisdiction and remand the case to the Board for further proceedings of any description, or is its power to permit further proceedings to be had before the Board limited to the express power granted to the Court to entertain a petition by either party for leave to adduce additional testimony and grant the same for good cause showit, in which case the Board does not become revested with jurisdiction, and acquires no authority to modify or set aside its order, but only to make and file with the Clerk "its recommendations, if any, for the modification or setting aside of its original order" upon the basis of such modified or new findings of fact as the Board may make by reason of the new evidence thus adduced?

REASONS WHY THE WRITS SHOULD BE GRANTED

1. In entering its order in the Board's case granting to the Board leave to withdraw its petition to enforce its order, without the consent and over the objection of the respondent Company, which—if the Court had proceeded to a determination of the issues and had decided them in favor of the respondent Company—under the express provision of the Act would have been entitled to the entry of a decree setting the order aside, and not merely to a dismissal of the Board's case, the Court below decided an important question of Federal law which has not been, but should be, settled by this Court.

2. In granting leave to the Board to withdraw its petition to enforce its order in the face of the express provision of the Act and of the Company's prayer for affirmative relief contained in its answer, the Court below acted in probable conflict with decisions of this Court and with decisions

of other inferior Federal courts. *Ex parte Skinner & Eddy Corp.*, 265 U. S. 86, 93; *Pullman's Palace Car Co.* v. *Central Transportation Co.*, 171 U. S. 138; *City of Detroit* v. *Detroit City Railway Co.*, 55 Fed. 569.

3. In granting the Board's motion to withdraw its petition in its case, the Court below so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Cases *supra;* National Labor Relations Act, Sec. 10(e) and (f).

4. In entering its order in the petitioner's case, remanding the case to the Board for further proceedings, the court below decided an important question of Federal law which has not been but which should be settled by this Court.

5. By granting, in the petitioner's case, the Board's motion to remand the case to the Board for the purpose of permitting the Board to set its order aside and enter a new one (thereby in effect ordering petitioner's case to be dismissed on motion of the respondent Board, and in the absence of a motion by it to dismiss either for lack of jurisdiction or failure to state a cause of action) the Court below so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

6. In remanding the case to the Board without itself first setting aside the Board's order, the Court acted in a way in probable conflict with the decisions of this Court (*Duke Power Company* v. *Greenwood County*, 299 U. S. 259; *Willing* v. *Binenstock*, 302 U. S. 272; *Interstate Circuit* v. *United States*, decided by this Court on April 25, 1938); and so far departed from the accepted and usual

course of judicial proceedings as to call for an exercise of this Court's power of supervision.

7. In divesting itself of jurisdiction after it had attached, and in surrendering jurisdiction to the Board by granting the Board's motion for leave to withdraw its petition in its case, and by granting the Board's motion to remand in petitioner's case, the Court below acted in probable conflict with the decision of this Court in *In re Petition of National Labor Relations Board*, decided May 31, 1938, as well as without any express statutory authority, and in probable excess of its powers.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari be issued in each of the above-named causes under the seal of this Court directed to the United States Circuit Court of Appeals for the Sixth Judicial Circuit, City of Covington, Kentucky, commanding said Court to certify and send to this Court on a day to be designated, a transcript of the record and all proceedings had in each of said causes, to the end that each of the two orders referred to at pages 1 and 2 hereof may be reviewed and determined by this Court; that said orders and each of them may be set aside and reversed, and that petitioner be granted such other and further relief as may be just and proper.

Dated, New York, N. Y., July 6, 1938.

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BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI

THE CASE BELOW

The case below is unreported and the orders sought to be reviewed, entered May 5, 1938, and June 10, 1938, respectively, were entered without opinion (R. 51, 108).

JURISDICTION OF THE COURT

The jurisdiction of this Court is invoked under § 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 938, 28 U. S. C. § 347(a)).

The order of the Court below granting the Board leave to withdraw its petition in its case, followed by its withdrawal, put an end to that case. By its order remanding the petitioner's case to the Board for the purpose of permitting the Board to set aside its order and make a new one, the Court surrendered its jurisdiction to the Board. Such order was thus the equivalent of an order dismissing petitioner's case on the motion of the Board. Both orders, having the effect of finally disposing of the case in which made, were final. *Wilson* v. *Republic Iron & Steel Co.*, 257 U. S. 92; *Cybur Lumber Co.* v. *Erkhart*, 247 Fed. 284 (C. C. A. 5th); *Iowa-Nebraska Light & Power Co.* v. *Daniels*, 63 Fed. (2d) 322 (C. C. A. 8th); *Massachusetts Fire and Marine Ins. Co.* v. *Schmick*, 58 Fed. (2d) 130 (C. C. A. 8th).

Moreover, even if interlocutory, they may be reviewed on certiorari. *Gay* v. *Ruff*, 292 U. S. 25; *United States* v. *Gulf Refining Co.*, 268 U. S. 542; *Forsythe* v. *Hammond*, 166 U. S. 506.

STATEMENT

The pertinent facts in both cases are adequately stated in the foregoing petition; in the Board's case (No. 182 in this Court) at pages 3-5, and in the petitioner's case (No. 183 in this Court), at pages 5-6.

SPECIFICATION OF ERRORS

The errors which petitioner will urge, if the writs of certiorari be granted, are that the Circuit Court of Appeals for the Sixth Circuit erred:

1. In permitting the National Labor Relations Board, over petitioner's objection, to withdraw without prejudice its petition for enforcement of its order against petitioner.

2. In remanding petitioner's case to the National Labor Relations Board for further proceedings.

3. In remanding petitioner's case to the National Labor Relations Board for further proceedings without advice, direction or determination as to the law to be observed by the Board in such further proceedings.

4. In remanding petitioner's case to the National Labor Relations Board without any determination that the order of the Board was invalid, or as to the necessity or propriety of further action by the Board, and without setting aside its order.

5. In refusing to vacate its order permitting the National Labor Relations Board to withdraw without prejudice its petition for enforcement.

6. In failing and refusing, over the objection of petitioner, to proceed to a decree in the Board's case.

7. In failing and refusing, over the objection of petitioner, to proceed to a decree in the petitioner's case.

V

THE COURT SHOULD GRANT CERTIORARI IN ORDER TO AVOID THE CONFUSION WHICH WOULD OTHERWISE RESULT.

Unless the writs be granted, the Board, if it pursues its announced intention, will set its order aside, conduct such further proceedings as it chooses, and then enter a new order. If, as we believe, the Court erred in entering the orders sought to be reviewed, all such further proceedings will be a nullity, and any new order predicated either in whole or in part thereon will be void. This will be the result if the Court erred in either case. This is so because, if it erred in either, exclusive jurisdiction is still in the Court.

If, therefore, certiorari should be denied, and a new order entered, all of the questions presented by this application would necessarily be involved in a new suit to review the Board's order.

Moreover, it would be difficult, if not impossible, to determine from the new decision and order of the Board to what extent its order was predicated upon the proceedings previously had and those subsequently taken. The resulting confusion affords an additional reason why the writs should be granted.

The questions presented are not only of peculiar importance as a guide for the further conduct of this case, both by the Board and by the Court below. It is equally or more important that this Court determine the broad question of whether a Circuit Court of Appeals which has once acquired jurisdiction over a proceeding to review an order of an

administrative tribunal may, without statutory authority so to do, divest itself of such jurisdiction and surrender the same to the administrative tribunal for the purpose of permitting it or the party against which its order is made to "obviate" or "eliminate" by further proceedings before it issues raised by the pleadings in the case before the Court. The action of the Court below, if validly taken, constitutes a precedent which should be sanctioned by this Court. If invalidly taken, it should be set aside by this Court to avoid its repetition by the Court below or others, by an authoritative settlement and determination by this Court of the important Federal question necessarily determined by the Court below in entering the orders sought to be reviewed.

It is respectfully submitted that the writs in both cases should be granted.

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Attorneys for Petitioner.

ARGUMENT

I

AT THE TIME OF THE ENTRY OF BOTH ORDERS SOUGHT TO BE REVIEWED THE JURISDICTION OF THE COURT WAS COMPLETE AND EXCLUSIVE.

When the Court entered its order granting leave to the Board to withdraw its petition in its case, a certified transcript of the record before the Board, as well as the Board's petition to enforce, was on file in the Court below (R. 6, 8). Similarly, when the Court entered its order remanding petitioner's case to the Board, a certified transcript of the record before the Board, as well as petitioner's petition to review and set aside the order of the Board, were on file in the court below (R. 80).

The jurisdiction of the Court was thus complete and exclusive at the time that the orders sought to be reviewed in either case were entered (*National Labor Relations Act*, Section 10(e) and (f); *In re Petition of National Labor Relations Board*, decided by this Court May 31, 1938).

II

FOR EACH AND ALL OF THE REASONS STATED IN THE PETITION A WRIT OF CERTIORARI SHOULD BE ISSUED IN THE BOARD'S CASE, NO. 182 IN THIS COURT.

It is well settled that a plaintiff may not discontinue his suit over the objection of the defendant, if the defendant has become entitled to affirmative relief. *Ex parte Skin-*

ner & Eddy Corp., 265 U. S. 86, at page 93; *Pullman's Palace Car Co.* v. *Central Transportation Co.*, 171 U. S. 138; *City of Detroit* v. *Detroit City Railway Co.*, 55 Fed. 569. This rule applies to petitioner's situation because it became entitled to affirmative relief by the express provisions of the Act upon the filing of the Board's petition to enforce and also by reason of the filing of its answer demanding affirmative relief.

In expressly providing that, in a suit arising under the Act, the court should enter an affirmative decree in favor of a successful respondent, the Congress must be assumed to have been familiar with the rule of law established by the cases above cited. *Cf. Manhattan Properties, Inc.* v. *Irving Trust Company*, 291 U. S. 320, 334-336; *United States* v. *Farrar*, 281 U. S. 624, 634; *Schall* v. *Camors*, 251 U. S. 239, 250-251.

But it is unnecessary to invoke the rule of the cases last cited. The Act is plain and unambiguous. The duty of the Court to proceed to an affirmative decree, in behalf of one party or the other, once its jurisdiction is complete, is imposed in express terms. It may not thereafter surrender jurisdiction to the Board at the instance of either party. No such power is conferred. None may be implied. Had Congress intended that, despite the plain provisions of the Act and the recognized rule of procedure where affirmative relief is sought by the respondent, the petitioner might, without prejudice, voluntarily dismiss its petition, it would have so provided. Had it intended to confer power upon the Court, within its discretion, to permit the discontinuance or withdrawal, without prejudice, of the suit by petitioner, it would have conferred such power upon the Court. On the contrary, the Act provides by its ex-

press terms, without limitation, that once the Court has acquired jurisdiction it shall proceed to a final decree in conformity with the prayer of the petition, if the petitioner shall prevail, and shall grant affirmative relief to the respondent if the respondent shall prevail.

It is believed that in granting the Board's motion for leave to withdraw its suit, without prejudice, the court below erred and acted in excess of its powers. In any event, in so doing it decided an important question of Federal law, which should be determined by this Court. In so doing it is also believed that it acted in probable conflict with the decision of this Court in *In re Petition of National Labor Relations Board, supra*, and departed from the accepted and usual course of judicial proceedings. For each and all of these reasons a writ of certiorari should issue in the Board's case, No. 182, in this Court.

III

FOR EACH AND ALL OF THE REASONS STATED IN THE PETITION A WRIT OF CERTIORARI SHOULD ISSUE IN THE PETITIONER'S CASE, NO. 183 IN THIS COURT.

By granting the Board's motion to remand the petitioner's case to the Board, the Court divested itself of jurisdiction and surrendered the same to the Board.

As pointed out in our statement of the questions presented, the Act does not in express terms authorize the Court so to do (p. 4, *ante*).

No such power may be implied. On the contrary, the Act contemplates that the Court, once its jurisdiction has

attached, shall proceed to an affirmative decree in favor of one party or the other.

The only provision which the Act contains, whereby further proceedings may be had before the Board, is the provision for the taking of additional evidence before the Board, for good cause shown to the court. Even in this connection, however, power in the Board to set aside its order and make a new one is expressly withheld. Its authority is confined to the filing with the court of "its recommendation, if any, for the modification or setting aside of its original order", by reason of such additional evidence (Section 10(e)). Power to modify or set aside remains exclusively with the court. By thus limiting the powers of the Court and Board, the Act clearly negatives the existence of any power in the Court to remand the case to the Board for any reason and also clearly negatives the asserted power of the Board to set aside its own order after a court has acquired jurisdiction, and after further proceedings, nowhere provided for in the Act, to make a new order.

Nor may it be argued that such power is inherent in the Court and may be exercised without express authority. A constitutional Federal Court, upon which jurisdiction has been conferred to review the orders of an administrative tribunal, does not sit as a supervisory administrative tribunal. *Cf. Prentis* v. *Atlantic Coast Line*, 211 U. S. 210; *Federal Radio Commission* v. *General Electric Co.*, 281 U. S. 464. It is without authority either to give directions to such a tribunal or surrender its jurisdiction thereto. *Cf. Federal Radio Commission* v. *Nelson Bros. Co.*, 289 U. S. 266, 278. Even when sitting in a purely appellate capacity to review the orders or decrees of a District Court, to which it may remand cases and to which it may give direc-

tions, a Circuit Court of Appeals may not remand a case to the District Court, with either direction or permission to take further proceedings, and thereafter enter a new decree, if it sees fit, *without itself first setting aside the decree or order appealed from. Duke Power Company* v. *Greenwood County*, 299 U. S. 259, 268. Much less may it, without specific statutory authority, surrender its jurisdiction to an administrative tribunal and thus escape performance of the judicial function imposed upon it. It is concerned only with the validity of the order before it. If valid, it is required to enforce it; if invalid, to set it aside.[1] In the latter event it is not concerned with such further steps, if any, as the administrative officer or tribunal can or may take. It is possessed of no power to remand for the purpose of permitting such officer or tribunal to "validate" its order (*Cf.* decision of this Court, denying petition for rehearing in *Morgan* v. *United States*, No. 581, decided May 31, 1938). It is equally without power to divest itself of jurisdiction for the purpose of permitting such tribunal to take further proceedings for the purpose of "obviating" or "eliminating" questions or issues, by reason of which the order attacked might be held invalid if the Court should proceed to determine them. Only by express grant may such power be exercised by a court which has acquired jurisdiction to determine the validity of an order of an administrative tribunal, and which has the duty, under the statute, to determine the same.

Finally, considering the avowed purpose of the Board itself to set aside its order and make a new one if its motion

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[1]The Court in this case did not set the Board's order aside but washed its hands of the case and surrendered jurisdiction to the Board without determining either the validity of the Board's previous action or laying down any rule to govern the Board's future action.

to remand should be granted, the effect of the Court's order remanding the case is equivalent to an order dismissing the case at the instance of the respondent and over the opposition of the petitioner. As we have already pointed out, a plaintiff, according to the established usages of judicial proceedings, may not be permitted to discontinue his suit without prejudice where the defendant has prayed for affirmative relief. Even more extraordinary is the theory, implicit in the action of the Court below, that a court, upon motion of a defendant, may order the plaintiff's case to be discontinued or dismissed, except upon a motion to dismiss for lack of jurisdiction, for failure to state a cause of action, or upon some other kindred ground.

It is respectfully submitted that in granting the Board's motion to remand petitioner's case the Court erred and exceeded its powers. In any event it decided an important question of Federal law which should be settled by this Court, and so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

IV

THE COURT, HAVING ONCE ACQUIRED JURISDICTION, COULD NOT DIVEST ITSELF THEREOF AND SURRENDER JURISDICTION TO THE BOARD MERELY UPON ITS ASSERTION OF AN INTENTION TO TAKE FURTHER ACTION IN THE PROCEEDING TO CORRECT ERRORS OF LAW OR FACT.

Both of the Board's motions had a common object, *i.e.*, to avoid the determination of certain of the issues raised by the petitioner in its answer in the Board's case and by its

petition to set aside in its own case; issues predicated upon the decision of this Court in *Morgan* v. *United States, supra*. In its motion papers the Board did not confess or admit that its procedure was in conflict with the principles laid down in either the first or second opinions of this Court in that case. Its motion was predicated upon an asserted desire to "obviate" or "eliminate" such issues, by itself setting aside the order and conducting further proceedings with a view to entering a new order. Had it by answer, motion or otherwise confessed the invalidity of its order by reason of failure to accord to the petitioner that full, fair and open hearing required by law, petitioner would have been entitled to a decree setting aside the order. Whether upon the entry of such an order the Board could correct any of its errors by further action in the proceeding wherein the present order was made would depend upon the provisions contained in the decree and the legal effect thereof.

The purpose of both of the Board's motions was to permit it to attempt or in form to attempt to mend its fences and patch up its record by persuading the Court to divest itself of jurisdiction and to surrender the same to the Board. As we have seen, the Act confers upon the Court no such power. It does not contemplate that the Court may divest itself of jurisdiction for the purpose of permitting the Board to correct errors which it may have committed, either of law or of fact, any more than it contemplates that the Court may divest itself of jurisdiction for the purpose of permitting the party against which the order has been made to patch up his record.

The Board may set aside and modify its order in order to reopen the proceedings, at any time before the jurisdic-

tion of the Court to review the validity of its order attaches, but not after. Sec. 10(d); *In re Petition of National Labor Relations Board, supra.* Nor does the Act confer upon the Court, within its discretion, power to surrender jurisdiction to the Board in order that it may correct errors previously committed and thereby validate an order otherwise void.

In this particular case the Board requested the Court to divest itself of jurisdiction and remand the case to the Board for the purpose of permitting the Board to set aside its own order, and, after taking further proceedings in compliance or pretended compliance with the decision of this Court in *Morgan* v. *United States,* enter a new order. Failure to accord to the respondent in a proceeding before an administrative tribunal that "full, fair and open" hearing which the law requires, is not the only ground upon which an order of such a tribunal may be set aside. As said by this Court in *Morgan* v. *United States,* 298 U. S. 468, 480:

> "There must be evidence adequate to support pertinent and necessary findings of fact. Nothing can be treated as evidence which is not introduced as such. *United States* v. *Abilene & Southern Ry. Co., supra.* Facts and circumstances which ought to be considered must not be excluded. Facts and circumstances must not be considered which should not legally influence the conclusion. Findings based on the evidence must embrace the basic facts which are needed to sustain the order."

It will scarcely be contended that if in a petition to set aside an order of the Board it was alleged that the order was

invalid upon any or all of the grounds stated, the Court, upon motion of the Board, could, instead of determining the issues thus raised, divest itself of jurisdiction and remand the case to the Board for the purpose of taking further proceedings and entering a new order in order to "obviate" or "eliminate" such issues.

Assume, for example, a case in which the petition alleges the order to be invalid because of the absence of findings sufficient in law to support it. This contention being thus directed to the attention of the Board, the Board concludes that there may be doubt as to the sufficiency of the findings made, but without conceding them to be deficient moves the Court to divest itself of jurisdiction and remand the case to the Board to enable the Board to set aside its order and make new findings and a new order, thus "obviating" or "eliminating" the issue raised in respect of the order sought to be set aside. Or, assume that the Board has made a finding alleged by the petition to be unsupported by evidence. The Board, reviewing the evidence in the light of the petition, reaches the conclusion that there may be danger that the Court would so hold. It also reaches the conclusion that the fact found, although erroneously considered by the Board in the making of its order, is not essential to its final conclusion. It therefore moves the Court to divest itself of jurisdiction in order that it may itself set the order aside, eliminate the finding in question and make a new order. It will scarcely be contended that the Act contemplates any such procedure, particularly in view of Sec. 10(d) which permits the Board to retrace its steps even after a petition to set aside is filed and until a certified transcript of record is filed. *In re Petition of National Labor Relations Board, supra.*

Or assume that the petition alleges that the Board in reaching its conclusion failed to give consideration to facts and circumstances required to be considered by it, or gave consideration to facts and circumstances which it was not entitled to consider. Reviewing its findings, decision and order in the light of these allegations, the Board reaches the conclusion that the issues thus raised, if submitted to the Court for determination, might be determined adversely to it. It accordingly moves the Court to divest itself of jurisdiction and remand the case to the Board in order that it may set aside its existing order, and after revising its decision so as to obviate the issues thus raised, make a new order. It will scarcely be contended that the Court is possessed of any such power.

In point of fact, in the petitioner's case, the petitioner alleged that the order was invalid because unaccompanied and unsupported by findings of fact within the meaning of the Act (Par. 10, R. 66), because the purported findings of fact were in material and controlling respects not supported by evidence and were inadequate, incomplete and insufficient because of the failure of the Board to consider facts required to be considered by it (Par. 12, R. 66). It further alleged that the order was invalid because of misconduct on the part of the Trial Examiner (Pars. 13-16, R. 66-67) and that various parts of the order were invalid by reason of the absence of findings necessary to support them, insufficiency of the evidence to support the findings made, and because in making them the Board exceeded the powers conferred upon it by the Act (Pars. 54-67, R. 74-76). It will scarcely be contended that, upon motion of the Board, the Court could divest itself of jurisdiction and remand the case to the Board for the purpose of per-

mitting the Board to set aside its order, and after further proceedings and reconsideration, enter a new order either in substance similar to the old one or modified so as to "obviate" or "eliminate" the issues raised by the petition to set aside.

The statute does not empower the Court to divest itself of jurisdiction by remanding the case for the purpose of permitting the Board to take further proceedings which, if taken, may "obviate" or "eliminate" the issues raised either by a petition to set aside the Board's order, or by the respondent's answer in a suit brought by the Board to enforce it. The reason why it does not is plain. In the orderly conduct of proceedings such as this, even more than in ordinary court proceedings (*Cf. Realty Acceptance Corp.* v. *Montgomery*, 284 U. S. 547), it is essential that at some given point of time an administrative board, which is both prosecutor and judge, shall lose control of the proceedings and that a court shall obtain exclusive jurisdiction thereof. By Section 10(d) of the Act the greatest latitude is given to the Board to correct its errors until the time when a certified transcript of the proceedings before it is filed in court. If thereafter it could have the case back for the asking, there is no reason in principle why at any time prior to decree it could not avail itself of this right. It could indeed upon or after the hearing upon the merits before the court insist upon a remand upon the slightest intimation from the court of its belief that there had been some irregularity in the proceedings before the Board. Even were such a construction of the Act possible, as it is not, it ought not to be made unless unavoidable.

There is no distinction in principle between the cases assumed and the instant case. Once the jurisdiction of the

Court has attached, the Act requires it to proceed to a decree. If, as a result, the Court sets the order aside, it is not concerned with the proceedings that the Board, which is not a judicial body, may thereafter take. *Morgan* v. *United States, supra,* on petition for rehearing.

The action of the Court below in both cases was thus predicated upon an error common to both, to wit, that the Court could divest itself of jurisdiction, and without itself setting the order aside either as a result of admissions made by the Board upon some issues or after a determination of all the issues presented, remand the case to the Board for the purpose of allowing it to set aside its own order and to take further proceedings for the purpose of "obviating" or "eliminating" some of the issues raised by the petitioner. It is immaterial whether such issues relate to the sufficiency of the hearing, the sufficiency of the findings, the sufficiency of the evidence to support the findings, the sufficiency of the legal theory upon which the order is predicated, or upon any other error of law by reason of which the order of the Board may be set aside. Petitioner, having invoked the jurisdiction of the Court for the purpose of having these issues determined, was entitled to have them determined unless, by reason of admissions of the Board confessing its own error, the petitioner became entitled to a decree setting the order aside without such determination.

The Board, like the petitioner, must stand or fall by the record made in the proceedings before it, except only to the extent that either party for good cause shown may be permitted by the Court to adduce further evidence before the Board.

APPENDIX

Paragraphs (d), (e) and (f) of Section 10 of the National Labor Relations Act (49 Stat. 449; 29 U. S. C. §§ 151-166) provide as follows:

"(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

"(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and

enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

"(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order

in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive."